

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: Holly B. Armstrong, Commission Counsel
John W. Wallace, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Termination of Committees -- **[Pre-notice Discussion]** of Proposed Regulation 18404.1

Date: July 18, 2001

Introduction

At the July 2001 Commission meeting, in the context of the policy discussion on the “one-bank-account” rule of Proposition 73 and its impact on Proposition 34, the Commission questioned whether pre-January 1, 2001, committees were subject to any deadline on when they had to wind-up activity and terminate. Under current law, staff explained that termination of committees was voluntary by the candidate, so long as certain conditions were met.

At that meeting, the Commission requested that staff examine whether a mandatory termination rule was necessary and practical and draft a regulation addressing termination of committees appropriate to Proposition 34.

On July 18, 2001, an interested persons meeting was held at the Commission’s office where feedback was received from political attorneys, state agency representatives, California Common Cause, League of Women Voters, and representatives of the two major parties. The results of those discussions and staff’s research are contained herein.

Background

Currently, a committee retains its status as a committee “until such time as that status is terminated pursuant to Section 84214.” (Govt. Code § 82013(c).) Government Code § 84214¹ states:

“Committees and candidates shall terminate their filing obligation pursuant to regulations adopted by the Commission which insure that a committee or candidate will have no activity which must be disclosed pursuant to this chapter subsequent to the termination. Such regulations shall not require the filing of any campaign statements other than those required by this chapter. In no case shall

¹ All further statutory references are to the Government Code, unless otherwise specified.

a committee which qualifies solely under subdivision (b) or (c) of Section 82013 be required to file any notice of its termination.”

Previously, the Commission adopted a regulation governing the termination of a committee at the committee’s discretion. Regulation 18404(b) provides that recipient committees are terminated as follows:

“Recipient Committees. A treasurer of a committee which qualifies pursuant to Government Code Section 82013(a) may terminate the committee's status as a committee, only by completing the termination section on the Form 410 (Statement of Organization) declaring, under penalty of perjury, that the committee:

“(1) Has ceased to receive contributions and make expenditures and does not anticipate receiving contributions or making expenditures in the future;

“(2) Has eliminated or has declared that it has no intention or ability to discharge all of its debts, loans received and other obligations.

“(3) Has no surplus funds; and

“(4) Has filed all required campaign statements disclosing all reportable transactions.”

Under the current regulation, there is no deadline for the termination of old committees, and the primary incentive for old committees to formally terminate is that they will no longer have filing obligations. While many committees do properly terminate at their conclusion, many committees remain on the books for many years, some for decades after their candidates have left office. Some of these committees have debt. Some of these committees have funds. Staff has no way of estimating how many open committees exist that have not properly filed a Statement of Organization declaring their intent to terminate, as required under Regulation 18404.

As noted above, Section 84214 expressly requires that “committees and candidates shall terminate their filing obligation *pursuant to regulations adopted by the Commission...*” (emphasis added). The statute does set some limitation on the scope of the Commission’s regulatory power with respect to implementing a “termination” scheme for committees formed pursuant to the Act. For example, the regulation:

- Must insure that a committee or candidate will have no activity which must be disclosed pursuant to this chapter subsequent to the termination;
- May not require the filing of any campaign statements other than those required by this chapter; and

- May not apply a “termination” rule requiring notice to any committee which qualifies solely under subdivision (b) or (c) of Section 82013.

Other than these statutory limitations on the Commission’s authority to regulate the manner in which committees and candidates terminate their filing obligations, the Commission may create by regulation any reasonable termination requirement.²

Argument for Mandatory Termination of Committees

The current system of perpetual committees with no real means of tracking them could, and the Commission has suggested, should, be phased into a more structured system where committees do not outlive their usefulness. In other words, once the candidate has left office or has failed in his or her bid for office, steps should be taken toward termination of the committee. If there is debt to be retired, then efforts should be made to retire the debt. But at some point, there is no longer any reason for the committee to continue its existence, and it should be terminated at that point. The Federal Elections Commission recognized this when it developed an administrative termination process, by which a committee is terminated based on a lack of activity over specified periods of time. *See* 11 C.F.R. § 102.4.

An additional problem with perpetual committees is presented with Proposition 34’s incorporation of the “last in, last out”/“first in, first out” accounting method selection required by Section 85306 and Regulation 18536. Without a mandatory termination of committees at some point, it is quite possible that a candidate could be attributing transfers to very old contributors, some of whom may have moved out of the state or may even have passed away. Likewise, allowing multiple committees to proliferate opens the door to endless transfers back and forth between committees, which could make tracking such transfers more difficult for enforcement purposes.

There is also some logic to ending committees formed under an old scheme when a new statute comes into being. This is especially true where, as here, the new statutes impose restrictions that did not, and do not, apply to the old committees. The attached partial list of Committees with Net Debts Outstanding, generated in April 2001, demonstrates open committees dating from at least 1992; there are 110 committees on this list.³ There will also be open committees that have no debt that do not appear on this list. While some of these committees’ candidates are still in office, many

² Section 81003 provides: “This title should be liberally construed to accomplish its purposes.” Section 83112 provides: “The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission.”

³ This is only a partial list, because it contains only those committees that file their reports with the Secretary of State’s Office electronically. There is no way to estimate the number of open committees that file paper reports, or the amount of debt carried by those committees, without doing a physical search of the Secretary of State’s records. This search has not yet been undertaken by staff.

of these committees serve no purpose and should be closed as expeditiously as possible.⁴ Those committees with active candidates in office should be allowed a reasonable time to retire debt after the end of the candidate's term of office.

Argument Against Mandatory Termination of Committees

Mandatory termination of committees raises several practical and legal issues:

- Interference with contracts is prohibited by both the U.S. and California Constitutions, and an argument could be made that a regulation requiring the termination of a committee with outstanding debt is, in effect, an interference with the committee's contract with a third party. The statute of limitations for an action on a written contract in the State of California is four years from the date of breach.
- Likewise, requiring termination of a committee that has surplus funds that have not yet been disposed of pursuant to Section 89519, which contains no deadline by which surplus funds must be disbursed, may be problematic.
- Finally, the regulation would establish different rules for state committees versus local committees by exempting local committees from its application. Local committees are not subject to the provisions of Proposition 34, but are subject to the other provisions of the Act. Because the issue of termination of committees arose in the context of problems involved with harmonizing Proposition 34 with other provisions of the Act, and because Proposition 34 does not apply to local committees, the consensus among staff was that this regulation should not be applied to the local committees. An additional reason for not applying this regulation to local committees was that staff was concerned that communicating any new rules regarding termination to local jurisdictions would be difficult. However, having a different set of rules that apply to locals may make the rules more difficult to enforce.

THE FORM AND SUBSTANCE OF REGULATION 18404.1

The proposed regulation would provide deadlines for candidate controlled committees to terminate, taking into account whether or not they are subject to Proposition 34, and whether or not the committees have debt. There is a range of options from which the Commission may choose regarding the appropriate deadlines for each category of committee. The regulation also requires that the campaign bank account be closed at the time of termination and that a successful candidate for elective state office close any open local committees he or she controls. The regulation provides a procedure for obtaining an exemption from the deadlines for termination of a committee under certain specific circumstances, or for good cause shown on a case-by-case basis, vesting authority in the Executive Director of the FPPC for a final decision on the matter.

⁴ For example, one former unsuccessful statewide candidate's committee holds \$222,930.11 in funds. The candidate does not currently hold any other public office in the State.

The beginning of the regulation, subsections (a) and (b), is divided into “Pre-2001 Committees” and “2001 and Post-2001 Committees,” addressing committees to which Proposition 34 is not applicable (pre-2001), and those to which Proposition 34 is applied (2001 and post-2001).

Subsection (a)

Subsection (a) invokes the provisions of Regulation 18404 in terminating any committee organized for a pre-January 1, 2001 election.

Subsection (a)(1) is directed to those candidates in elections held prior to January 1, 2001, who have open committees, but who are not currently in office. Subsection (a)(1) directs that committees where the candidate is not in office be terminated no later than December 31, 2002. Although it may seem that a committee for which the candidate is not in office could be closed almost immediately after adoption of the regulation, identification of many of the older committees to which this regulation is applicable will require a manual search of the Secretary of State’s records in order that the candidates associated with the committees may be notified of the requirement to terminate their committees. Because some of the committees will be very old, some of the candidates may be difficult to locate.

Subsection (a)(2) is directed to those candidates elected prior to January 1, 2001, and, thus, prior to Proposition 34, but who are still in office. Subsection (a)(2)(A) requires that committees that have no debt be terminated within either 3 or 6 months after the end of the term of office, whichever option the Commission selects.

Subsection (a)(2)(B) addresses committees that have debt, and requires that these committees be terminated no later than 12, 18 or 24 months after the end of the term of office, depending on the option selected by the Commission. As shown on the attached partial list of committees with outstanding debt, at least as of February 22, 2001, outstanding debts for these pre-2001 electronically filing committees ranged from \$297.60 to \$1,288,612.80. Therefore, a broader range of dates is provided for the Commission’s consideration on this issue. However, despite the magnitude of some of the debt, a longer open period is not recommended, given the potential for misuse of these pre-Proposition 34 accounts. At the interested persons meeting regarding this proposed regulation held on July 18, 2001, the regulated community expressed concern about the forced closure of committees with debt, and the possible elimination of a legal remedy by vendors and other creditors that would result from the Commission’s action. It should be noted, however, that the proposed regulation includes a provision for an exemption to be considered on a case-by-case basis, which provides a safeguard against non-payment of debt where there is a genuine means to pay it.

Subsection (b)

Subsection (b) is directed to committees to which Proposition 34 is applicable, i.e., those committees designated for elections on or after January 1, 2001. Once again invoking the

requirements of Regulation 18404, subsection (b)(1) and (b)(2) address, respectively, committees with and without “net debts outstanding”, as that term is defined in proposed Regulation 18531.6.

Subsection (b)(1) directs that committees without net debts outstanding must be terminated no later than 3 or 6 months after the end of the term of office for the successful candidate, and 3 or 6 months after the election for the unsuccessful candidate, depending on the time limitation the Commission selects.

Subsection (b)(2) gives committees with net debts outstanding 12, 18, or 24 months, depending on which time limitation the Commission selects, after the end of the term of office for the successful candidate, and 12, 18, or 24 months after the election for the unsuccessful candidate, to raise funds to pay off their debt. Pursuant to this section, the committee must be terminated at the conclusion of that time period.

Again, the regulated community was opposed to any regulation that would require the termination of a committee with outstanding debt, but offered no opinions as to what time periods would be reasonable for a committee to pay off its debt after leaving office or after an election.

Subsection (c)

The purpose of this subsection is to make it clear that termination of the committee ends all activity of the committee, and that any further contributions received must be returned and the candidate must close the campaign bank account.

Subsection (d)

Frequently, a candidate for elective state office will have one or more local campaign committees open at the same time as he or she is running for the state office. For example, he or she may be a sitting County Supervisor or City Councilman, and may run for State Assembly. In that case, he or she would have a committee for his or her local office, as well as for the State Assembly. This subsection would require the candidate to close all open local committees upon election to a state office. Thus, if the candidate were unsuccessful in his or her bid for State Assembly, the local committee would remain intact. However, once elected to the State Assembly, the candidate has no further need for his or her County Supervisor committee, and there is no reason that it should not be closed expeditiously. We have provided the Commission with the options of 6 and 12 months from the election in which the candidate was elected to the state office.

The regulated community expressed no objection to this proposal.

Subsection (e)

In discussions regarding this regulation, both internally and at the interested persons meeting, it was almost uniformly felt that a means was necessary for the requirements of this section to be waived, for good cause shown. Therefore, this subsection provides the procedure for seeking

an exemption from the Executive Director, with a requirement for submitting a request for an exemption 30 days prior to the termination date. The exemption would be for 6 months, and would be renewable in 6-month increments. Subsections (e)(1)(A) and (B) provide specific guidance for obtaining relief when a committee is receiving contributions and has the ability to pay its debts. Subsection (e)(2) allows a committee to obtain an exemption upon a showing that payment arrangements have been made with third-party creditors, and a demonstration of how the committee will meet the obligation. Subsection (e)(3) allows consideration of litigation as a reason for continuing the existence of a committee. Subsection (e)(4) provides for a case-by-case consideration of special circumstances, if good cause can be shown for allowing a committee to remain open beyond the deadline imposed by the regulation.

Subsection (f)

Since Proposition 34 is not applicable to local candidates, and the problems this regulation will address will not arise in the local context, there is no need to apply this regulation to local committees. Further, there is a general consensus among staff that it would be difficult to educate local candidates concerning this rule, and that applying this rule to local candidates would be inviting numerous violations, where the present system has not proven to be problematic on the local level.

Recommendations

The options presented to the Commission regarding this regulation are that it may choose to adopt a regulation regarding termination of committees, or it may decide to retain its current practice of permitting committees to remain open until they decide to close at their discretion. Since this is pre-notice discussion, if the Commission chooses to adopt a regulation, the proposed regulation will be presented for adoption at a future Commission meeting.

Decision Points

There are several decision points related to deadlines presented in the proposed regulation, if the Commission decides to consider adoption of a regulation. Staff has no specific recommendations regarding which of these deadlines the Commission should select, and sought guidance from the regulated community as being those with the most knowledge regarding what would be reasonable deadlines. The regulated community simply expressed its concerns that it was difficult to raise money to pay debt after a candidate has lost an election and provided no real guidance for reasonable deadlines.

Decision 1

Decision 1 relates to Pre-2001 committees, for those candidates still in office, but which have no debt. The Commission is asked to decide whether the candidate controlled committee should be required to terminate 3 or 6 months after the date the candidate leaves office or the end of the term of office, whichever comes first.

Decision 2

Decision 2 also relates to Pre-2001 committees, for those candidates still in office, but is addressed to those candidates who have debt. The Commission is asked to decide whether the candidate controlled committee should be required to terminate 12, 18, or 24 months after the date the candidate leaves office or the end of the term of office, whichever comes first.

Decision 3

Decision 3 relates to 2001 and Post-2001 committees with no debts. The Commission is asked to decide whether the candidate controlled committee should be required to terminate 3 or 6 months after the date the candidate leaves office or the end of the term of office, whichever comes first, for the successful candidate, or 3 or 6 months after the general or special runoff election, for the unsuccessful candidate.

Decision 4

Decision 4 also relates to 2001 and Post-2001 committees, but addresses those committees that have debts. The Commission is asked to decide whether the candidate controlled committee should be required to terminate 12, 18 or 24 months after the date the candidate leaves office or the end of the term of office, whichever comes first, for the successful candidate, or 12, 18, or 24 months after the general or special runoff election, for the unsuccessful candidate.

Decision 5

Subsection (d) of the proposed regulation requires a candidate who is successfully elected to a state office to close any open local committees that he or she controls. In *Decision 5*, the Commission is asked to select the appropriate deadline for the closure of the local committees.